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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana	)	CC Docket No. 98-121
	)	

REPLY COMMENTS OF THE BELL ATLANTIC TELEPHONE COMPANIES

Of Counsel
Edward D. Young, III

Michael E. Glover
James G. Pachulski
Leslie A. Vial
Edward Shakin
1320 N. Court House Road
8th Floor
Arlington, VA 22201
Tel. (703) 974-2944
Fax (703) 974-0783

Attorneys for the
Bell Atlantic Telephone Companies

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TABLE OF CONTENTS

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	)	
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REPLY COMMENTS OF THE BELL ATLANTIC TELEPHONE COMPANIES[1]

The comments on BellSouth's second application for in-region, interLATA service in Louisiana raise a number of broad legal and policy issues that, if they were to be addressed here, could have an impact on other section 271 applications, regardless of the Bell company involved or the state at issue. While Bell Atlantic is not in a position to address the specific facts relied upon by BellSouth in its application, these reply comments briefly address several of these broader issues.

1. <u>The attempts by the long distance incumbents to rewrite the Act's Track A requirements should be rejected.</u> The long distance incumbents renew their long running efforts to impose additional requirements on the Bell companies in order to satisfy Track A that are found nowhere in the Act, including by relitigating issues here that the Commission already correctly resolved against them.

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[1] The Bell Atlantic telephone companies are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

For example, Sprint (at 7) renews the twice rejected argument that unbundled network elements should not count as a competitor's own facilities. But it is simply wrong. As the Commission itself has explained, "the only logical statutory interpretation is that unbundled network elements purchased from a BOC are a competing provider's 'own telephone exchange service facilities,'" and "this statutory interpretation will better promote Congress' objectives" of opening local and long distance markets to added competition. *Ameritech-Michigan Order*, 12 FCC Rcd 20543 ¶¶94, 99, n. 230 (1997) (emphasis added); *see also Universal Service Order*, 12 FCC Rcd 8776, ¶¶154-159 (1997).

Likewise, WorldCom (at 7) argues that entire classes of interconnecting competitors should not qualify as Track A providers because it is unlikely that they will use all of the items included in the Act's competitive checklist. And while WorldCom ties its argument here to PCS providers, its theory would seem to apply equally to wireline competitors who are entirely facilities-based (and, therefore, don't need many of the items on the checklist). This argument is merely a variation on a previously rejected theme.

In reality, the Act no more requires that a competitor be "likely" to use each of the items on the checklist than it requires a competitor to actually be using each of the items. As the Commission previously held, the requirement to "provide" the items on the checklist does not mean that a Bell company filing under Track A actually must be furnishing each of the checklist items to one or more qualifying competitors. *Ameritech-Michigan Order*, ¶ 107-115. Rather, the only interpretation that is compatible both with the express terms of the Act and with Congressional intent is that a Bell company must "make available" each of the items on the checklist *Id.*, ¶109-111; *see also* Random House Unabridged Dictionary (2d ed.) (a principal definition of "provide" is to "make available"). Any other result would leave a Bell company – and development of long distance competition – hostage to the strategic purchasing decisions of its competitors, and produce the anomalous result that competitors with all of their own facilities would not qualify as Track A providers. *Id.*, ¶110.

In addition, the long distance incumbents (AT&T at 74; WorldCom at 5; Sprint at 6) argue that the requirements of Track A cannot be met by a competitor that serves residential customers predominantly through resale, even if it serves business customers over its own facilities and is, on the whole, predominantly facilities-based. They are wrong. As the Department of Justice has put it, the Act by its terms "does not. . . require that each class of customers (*i.e.*, business and residential) must be served over a facilities-based competitor's own facilities." *See* Addendum to DOJ's Oklahoma Evaluation at 3; *accord* DOJ Second Louisiana Evaluation at n.13. Rather, it says only that a competitor's "local exchange service," as a whole must be offered either exclusively or predominantly over its own facilities. 47 U.S.C. § 271(c)(1)(A) ("[f]or purposes of this subparagraph, such <u>local exchange service</u> may be offered by such competing providers either exclusively. . . or predominantly over their own telephone exchange service facilities. . .") (emphasis added). Consequently, so long as a competing provider is predominantly facilities-based, as a whole, Track A is satisfied even if the competitor serves residential customers exclusively through resale.

2. <u>Carriers should obtain access to unbundled elements in the manner prescribed by the Act</u>. The Justice Department and several competing carriers argue that collocation does not satisfy the requirements of section 251(c)(3) for access to unbundled network elements. They are wrong. Not only does the Act specifically require incumbent carriers to provide collocation for access to unbundled network elements, it is the only method of access authorized by the Act.

a. <u>The Act expressly adopts collocation as the method to obtain access to unbundled network elements</u>. Section 251(c)(3) only requires that local exchange carriers provide "access" to network elements on an unbundled basis, and do so "in a manner that allows requesting carriers to combine such elements" themselves. 47 U.S.C. §251(c)(3). This means that access must be provided to individual, physically separated elements. It also means that it is the competing carriers – not the incumbents – that must combine the elements.

The Act also specifies the method by which competitors obtain access to network elements. Section 251(c)(6) only requires local exchange carriers to provide collocation specifically to allow competing carriers to obtain "<u>access to unbundled network elements</u> at the premises of the local exchange carrier." 47 U.S.C. § 251(c)(6) (emphasis added). No other provision of the Act authorizes the Commission to require other methods of access at the premises of the local exchange carrier.

The reason the Act specifies collocation is simple. Collocation allows competing carriers with some network facilities of their own to fill in their networks by purchasing individual elements of the incumbent's network. And, as currently construed, it allows competing carriers to provide local service using only the network elements they purchase from the incumbent carrier and combine themselves.

The reason Congress directed that new entrants obtain access to network elements on an individual basis through collocation arrangements is to make sure that all competitors face the same costs in building their networks. Any new entrant that chooses to build its own network, either by purchasing its own network elements or leasing them from an incumbent, will bear the cost of putting together those elements into a network to provide service, just as the incumbents did when they built their networks.

Facilities based new entrants therefore face the same types of costs and risks as incumbents, including those involved in determining which physical facilities to deploy and in combining the particular mix of facilities they choose into a working network. For example, if a new entrant builds its own loop facilities and deploys its own switch, it will necessarily bear the cost of combining those network elements, just as the incumbent did when it built its network. The same is true where the new entrant obtains loop facilities and switching ports from the incumbent as network elements. By providing access to individual network elements through collocation arrangements, new entrants will likewise bear the costs of combining these network elements, as they would if they built these network elements themselves. If, on the other hand, a new entrant could avoid the cost of combining network elements by simply leasing all of them from the incumbent, there would be little incentive for the new entrant to build its own network facilities. It would also place at a competitive disadvantage any new entrants that had already built their own network elements and incurred the cost of combining them.

The long distance incumbents and their allies criticize collocation as a method of access to unbundled network elements. None of these criticisms holds water.

First, they contend that collocation is "discriminatory" and inconsistent with the Act because it requires a new entrant to combine unbundled network elements when those elements are already combined in the incumbent's own network. As an initial matter, any understanding of what constitutes "discrimination" under section 251(c)(3) must take account of the rest of section 251(c)(3). And it cannot be that Congress understood it to be "discriminatory" for an incumbent to do just what section 251(c)(3) expressly requires of it – provide network elements in a manner that allows a new entrant to combine them.

Moreover, the argument rests on the false premise that incumbents, unlike new entrants, are not required to combine network elements. But there is no such thing as "immaculate connections" of network elements in the incumbents' networks. Existing connections between network elements do not materialize spontaneously out of nowhere. For a combination of facilities to exist, the incumbent must have invested the time and effort to combine the constituent elements. The same is true for any new entrant that has constructed its own network facilities. In fact, the major long distance companies would have an advantage over incumbent local exchange carriers and new entrants that constructed their own networks if they alone did not have to combine network elements.

Second, AT&T (at 12-15) and Intermedia (at 16-17) claim that collocation cannot be the only method of access to unbundled network elements because incumbent local exchange carriers are required to provide every technically feasible method of access to network elements. The Act contains no such requirement. Section 251(c)(3) only places a duty on incumbent local exchange carriers to provide "access to network elements on an unbundled basis at any technically feasible point." 47 U.S.C. § 251(c)(3). As the 8th Circuit explained, "this provision only indicates where unbundled access may occur . . . ." *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 810 (8th Cir. 1997) ("Rehearing op.") (emphasis in original). It does not indicate the method of access incumbent local exchange carriers must provide to unbundled network elements. Only section 251(c)(6) prescribes the method of access that incumbents must provide to unbundled network elements, and that method is collocation.

Third, several carriers contend that providing access to network elements through collocation is inconsistent with another portion of the court's July 18 opinion which held that the Act does not require competing carriers to invest in facilities of their own before they can purchase unbundled elements. *Id.* at 814. It is inconsistent, they say, because a competing carrier necessarily must own some equipment if it has to collocate in order to connect unbundled elements to one another. This argument misstates the court's opinion and ignores the language of the Act.

The portion of the order they cite addresses a completely different issue. There, the court was presented with an argument that section 251(c)(3) "does not enable new entrants to provide telecommunications services to the public entirely by acquiring all of the necessary elements on an unbundled basis from an incumbent LEC;" instead, "a competing carrier should own or control some of its own local exchange facilities before it can purchase and use unbundled elements." *Id.* at 814 (emphasis added). The court disagreed, holding that "[n]othing in this subsection requires a competing carrier to own or control some portion of a telecommunications network before being able to purchase unbundled elements." *Id.* Rather, "a requesting carrier is entitled to gain access to all of the unbundled elements that, when combined by the requesting carrier, are sufficient to enable the requesting carrier to provide telecommunications service." *Id.* at 815. On its face, this holding has nothing to do with the method by which competing carriers obtain access to unbundled elements – whether they choose to combine the elements or not – and the court nowhere suggested that the collocation method prescribed by the Act was invalid.

In contrast, the plain language of the Act directly speaks to the issue, and expressly contemplates that competing carriers will, in fact, have to own at least some equipment of their own in order to obtain access to the unbundled elements that they can combine themselves. As a result, the Act imposes a duty on local exchange carriers to provide "for physical collocation of <u>equipment necessary for</u> . . . <u>access to unbundled network elements</u> at the premises of the local exchange carrier." 47 U.S.C. § 251(c)(6) (emphasis added).

b. <u>The Act does not require access to an entire preassembled platform of network elements.</u> Even though the Act only requires incumbent carriers to provide access to network elements in a manner that allows new entrants to combine those elements – and collocation fully satisfies that requirement – several carriers renew their requests for a preassembled combination of network elements. MCI (at 14) makes the most direct request for a preassembled combination of network elements: "the use of combinations of elements is the only method that supports the build-out of competing facilities over time, which is why Congress included this option in section 251(c)."[2] The Eighth Circuit has squarely addressed this issue and found that incumbent carriers cannot be required to provide preassembled combination of network elements.

The court's decision overturned the FCC order that allowed competing carriers to purchase a complete package, or "platform," of pre-combined elements at unbundled element prices. The court held that the Act's unbundling provision, 47 U.S.C. §251(c)(3), "does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services. To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other." *Rehearing op.* at 813. *See also MCIMetro Access Transmission Services, Inc. v. GTE Northwest, Inc.,* Docket No. C97-742, slip op. at 7-8 (U.S.D.C. W.D. Wash. July 7, 1998).

[2] One carrier makes the same request as MCI, but with a slight twist. Intermedia (at 20-21) argues that the Commission should require BellSouth to provide "a combination of a local loop, multiplexing in an ILEC end office, and interoffice transport that ultimately delivers traffic to a CLEC's collocated cage in another end office, or to a CLEC's point-of-presence outside of an end office" by simply "defin[ing] [this combination] as a discrete UNE." This semantic game is unavailing. A combination of network elements by any other name is still a combination of network elements and the Commission cannot require an incumbent carrier to provide a combination of network elements simply by calling that combination a single network element.

These statutory distinctions serve at least two crucial purposes. First, they preserve the incentives for competing carriers to invest in their own networks. As the Commission itself recognized, "[t]he interconnection provisions of the Act, Section[s] 251 and 252, are designed to promote *facilities-based* local exchange competition." *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services,* 11 FCC Rcd 16639, ¶ 80 (1996). But allowing competing carriers to obtain preassembled combinations of network elements at cost, rather than at the Act's prescribed wholesale discount, would virtually eliminate the financial incentive for competing carriers to invest in network facilities. As one competitor explained, "[i]f a competing carrier can obtain an entire platform [of preassembled network elements] at incremental cost that effectively replaces a tariffed service, it will have no incentive to invest in deploying its own facilities in the local network." Reply Comments of Intermedia Communications, Case No. 97-C-1963, at 5 (N.Y. P.S.C. Dec. 12, 1997). Congressional members have expressed the same concern: "[a]s long as they can accumulate risk free profits with minimal investment, competitors will not build their own networks to provide competing services." Brief of Amici Curiae The Hon. John D. Dingell, *et al.* at 16, *Iowa Utilities Board v. FCC* (8th Cir. 1996) (No. 96-3321).

Second, the statutory distinctions safeguard the universal service contributions that are currently built into intrastate rates. Most jurisdictions require incumbent carriers to charge below-cost rates for basic service (especially for rural and residential customers), and allow incumbents to offset those under-recoveries by charging above-cost rates to business and other customers. These contributions may continue indefinitely because there is no statutory deadline for states to replace them with universal service programs.

If competing carriers were able to "resell" the incumbents' local services by obtaining a preassembled combination of network elements at cost, rather than at the Act's prescribed wholesale discount, they could easily siphon away the incumbents' valuable business customers. Such regulatory arbitrage would take away the revenues that incumbents use to support affordable rates for rural and residential consumers, leading to massive pressure on the rates of those consumers and enormous losses for incumbents.

In addition, the court reaffirmed its earlier decision that an FCC rule requiring local exchange carriers to recombine unbundled elements on behalf of competing carriers "cannot be squared with the terms of subsection 251(c)(3)." *Rehearing op.* at 813. According to the court, the last sentence of section 251(c)(3) – which says that "[a]n incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements" – "unambiguously indicates that requesting carriers will combine the unbundled elements themselves." *Id.* And the court further clarified – by vacating an FCC rule that barred local exchange carriers from "separat[ing] requested network elements that the incumbent LEC currently combines," 47 C.F.R. § 51.315(b) – that the Act only requires local exchange carriers to provide access to individual network elements that have been physically unbundled from one another. *Rehearing op.* at 814.

c. Proposals to "virtually" combine network elements are just the platform by another name. AT&T (at 21-27) and several other carriers also request a preassembled combination of network elements, which they propose to "virtually" unbundle and recombine through access to incumbents' "recent change" operations support system. This request is sham unbundling and flatly inconsistent with the court's order.

AT&T has already conceded that this "virtual" unbundling proposal can only work where the network elements are already physically combined by the local exchange carrier. As Mr. Falcone explained during a recent FCC forum, "[t]he incumbent LEC will make the physical connection . . . and then the CLEC, through the appropriate firewall, would perform the Recent Change to combine the functionality of the switch with the functionality of the port . . . ." *In the Matter Common Carrier Bureau Forum Combinations Of Network Elements*, transcript at 39 (June 4, 1998). What these carriers are asking for is simply the ability to turn on a local switching port that has already been combined with a local loop by the incumbent carrier. This is no different than someone who flips a switch to turn on a light and then claims he just combined the bulb and the wires.

In an effort to side-step this fatal flaw in their proposal, these carriers argue that "unbundling" does not mean physical separation of network elements, Instead, they claim it means separate pricing of the elements. They are wrong.

The Act requires incumbent carriers to provide "access to network elements on an unbundled basis at any technically feasible point . . . ." 47 U.S.C. § 251(c)(3). The point of access referenced in the statute is a physical point where the requesting carrier can connect its own element or connect another one of the incumbent's elements. Such access would be unnecessary if "unbundling" simply meant separately pricing. In order to give meaning to this provision, as required by rules of statutory construction, the term "unbundle" can only be read to mean physically separated.

In fact, just last year, the Commission itself used the word "unbundle" as a synonym for "physically sever:" "Although we conclude that shared transport is *physically severable* from switching, incumbent LECs may not *unbundle* switching and transport facilities that are already combined, except upon request by a requesting carrier." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Order on Reconsideration, 12 FCC Rcd 12460, ¶ 44 (1997). In fact, AT&T itself told the Supreme Court that the Eighth Circuit erred because the term unbundled "does not mean 'physically separated.'" *AT&T Corp. v. Iowa Utilities Board*, AT&T Petition for Writ of Certiorari at 23 (March, 1998) (No. 97-826).

In the end, "virtual" rebundling is just resale by another name. It obliterates the careful distinction Congress drew between the different methods of entry into local markets. And it destroys any incentive for carriers to invest in competing network facilities.

d. Proposals to require direct access by competitors to the local exchange carrier's own equipment are beyond the Commission's authority and ignore important security concerns. There is also no basis for the Commission to require that local exchange carriers provide so-called "direct access" to their premises for competing carriers, with screwdrivers in hand, to combine network elements. Section 251(c)(3) only requires that local exchange carriers provide "access" to network elements on an unbundled basis, and do so "in a manner that allows requesting carriers to combine such elements" themselves. The collocation arrangement described above does precisely this, and does it in the way contemplated by the Act itself. In fact, the collocation provision of the Act, section 251(c)(6), requires local exchange carriers to provide for collocation specifically to allow competing carriers to obtain "access to unbundled network elements at the premises of the local exchange carrier." 47 U.S.C. § 251(c)(6) (emphasis added).

The duty to provide collocation does not require local exchange carriers to give competing carriers free roaming access to their premises. As the Commission's own collocation rules recognize, "[a]n incumbent LEC is not required to permit collocating telecommunications carriers to place their own connecting transmission facilities within the incumbent LEC's premises outside of the actual physical collocation space." 47 C.F.R. § 51.323(h)(2). Giving competing carriers direct access to a local exchange carrier's central office frames to hook up their own wires is way beyond the scope of collocation.

Moreover, any requirement to allow competing carriers to enter an incumbent's premises outside of a collocation arrangement would violate the Fifth Amendment because the Commission does not have such taking authority. Prior to the 1996 Act, the Commission did not have the statutory authority to require local exchange carriers to permit competing carriers to occupy their central offices, such as through collocation arrangements. As the Court explained, "[t]he Commission's power to order 'physical connections,' undoubtedly of broad scope, does not supply a clear warrant to grant third parties a license to exclusive physical occupation of a section of the LECs' central offices." *Bell Atlantic v. FCC*, 24 F.3d 1441, 1446 (D.C. Cir. 1994). The 1996 Act cured this problem by imposing on local exchange carriers "[t]he duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier . . . ." 47 U.S.C. § 251(c)(6).

Congress did not go further and give the Commission additional authority to require local exchange carriers to permit other kinds occupations of their central offices. For example, simply attaching connections to the incumbent's frame would be a taking that could only be required pursuant to express statutory authority. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (cable installation on appellant's building constituted a taking under the traditional physical occupation test, since it involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building). Similarly, a transient right given to competing carriers to enter an incumbent's property to make connections would be a taking that requires statutory authority. *See, e.g., Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (a taking occurs where individuals are given a permanent and continuous right to pass to and fro, even though no particular individual is permitted to station himself permanently upon the premise). The Commission lacks the statutory authority to order such takings.

Even if the Commission did have authority to order direct access or unsecured "cageless" collocation, there are important policy reasons for not imposing such requirements. Direct access to an incumbents' central office frames would present the danger of having multiple carriers with competing business interests gaining access to the facilities serving each others' customers as their personnel work simultaneously on the same central office frame. It would therefore require the additional cost of security and supervision to ensure that competing carriers don't deliberately or inadvertently disconnect service to another carrier's customer or slam a customer by making the wrong connections on the frame.

The Commission's own rules recognize the importance of security measures for collocation: "[a]n incumbent LEC may require reasonable security arrangements to separate a collocating telecommunications carrier's space from the incumbent LEC's facilities." 47 C.F.R. § 51.323(i). Likewise, the Massachusetts state commission reached the same conclusion when it rejected requests for unsecured "cageless" collocation.

> The number of [competing carrier] personnel with access to Bell Atlantic's equipment would increase, with increased possibility of human error and damage to Bell Atlantic's central office facilities. We view this escalation as potentially uncontrollable and therefore unacceptable. In this context, we find that Bell Atlantic has offered compelling evidence that the commingling of CLEC collocation equipment with Bell Atlantic equipment, along with access to such equipment by CLEC personnel, raises intractable security problems.

Petitions of Covad Communications Co., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of an interconnection agreement between Covad and New England Telephone and Telegraph Company, Docket D.T.E. 98-21, slip op. at 11 (June 5, 1998). There is, therefore, no basis for giving competing carriers the ability to access network elements in an incumbent's central office other than through a collocation arrangement.

3. The Commission must reject invitations to examine the rates set by the Louisiana commission for BellSouth's unbundled network elements. The Justice Department (at 18-26) invites the Commission to conduct "an assessment of UNE pricing arrangements" that have already been set by the state commission. The Commission must decline this invitation because it has no authority to examine these intrastate rates.

The Act gives the states – not the Commission – exclusive jurisdiction over unbundled network element pricing. As the Eighth Circuit explained, "the Act plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act." *Rehearing op.* at 796.

In addition, "[t]he FCC has no authority under section 271(d)(3)(A) or section 271 (d)(3)(C) to issue rules, regulations, orders, policy statements, or any other genre of opinions regarding how the local competition provisions of the Act involving interconnection, unbundled access, resale, or transport and termination of traffic should be priced." *Iowa Utilities Board v. FCC*, Order on Motions for Enforcement of the Mandate, 135 F.3d 535, 543 (1998). The Commission must, therefore, disregard the Justice Department's challenges to the rates set by the state commission.

4. The Commission cannot expand reciprocal compensation obligations to include Internet traffic. Several carriers (AT&T at 68-69; MCI at 62-63; Sprint at 56; Intermedia at 24-26) argue that BellSouth has not met its reciprocal compensation obligations because it is not paying reciprocal compensation for Internet traffic. These

carriers are wrong. Internet traffic is not eligible for reciprocal compensation because it is interstate traffic, not local traffic.

These carriers' argument is based on a mistaken reading of this Commission's orders creating the so-called "ESP exemption." Those orders merely exempt Internet and other enhanced service providers from paying the interstate access charges that otherwise would apply. They do not classify the traffic as "local." On the contrary, the only reason for an exemption in the first place is that the Commission recognized that this is not local traffic – it is interexchange. If it wasn't, no exemption would be needed.

Indeed, the Commission consistently has classified this traffic as interexchange, and predominantly interstate, since its first order creating the ESP exemption and continuing through the present – reiterating the conclusion most recently in its report to Congress on universal service. *See, e.g., MTS and WATS Market Structure*, 97 FCC 2d 682, ¶78 (1983) (ESPs use "local exchange services or facilities . . . for the purpose of completing interstate calls"); *id.* at ¶83 (ESPs use "exchange service for jurisdictionally interstate communications"); *Amendments of Part 69 of the Commission's Rules*, 2 FCC Rcd 4305, 4306 (1987) (ESPs "like facilities-based interexchange carriers and resellers, use the local network to provide interstate services"); *In re Access Charge Reform*, 11 FCC Rcd 21354, ¶284 (1996) (ESPs use "incumbent LEC facilities to originate and terminate interstate calls"); *Universal Service Report*, CC Docket No. 96-45, 11 Comm. Reg. (P & F) 1312, ¶146 (1998) (ESPs use "local exchange networks to originate and terminate interstate services").

Because Internet traffic is not "local," it is not subject to the payment of reciprocal compensation when it is handed off to another carrier for delivery to an Internet service provider. The Commission has firmly established that, as a matter of law, interconnecting carriers are entitled to receive reciprocal compensation only for the transport and termination of local calls – not for interstate, interexchange calls. As the Commission has explained, "[t]he Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd 15499, ¶¶1033 (1996), ("Local Competition Order"), *modified on reconsideration*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted*, 118 S. Ct. 879 (1998). For this reason, the reciprocal compensation obligations imposed by the Act "apply only to traffic that originates and terminates within a local calling area, as defined [by a state commission];" they "do not apply to the transport and termination of interstate . . . interexchange traffic." *Id.*, ¶¶1034-35. This distinction between local traffic and interstate, interexchange traffic, moreover, was upheld on appeal and is now final. *Comptel v. FCC*, 117 F.3d 1068 (8th Cir. 1997).

Even if the Commission had authority to expand the reciprocal compensation provisions of the Act, there is no policy reason for the Commission to do so. The payment of reciprocal compensation is a deterrent to local competition because it is available only when a customer's line is served by another carrier. As one independent analyst puts it, this creates the "single greatest arbitrage opportunity and hence market distortion in the telecom sector today" and deters competition for residence and other dial-up users of the Internet because it has the "perverse effect of turning customers from assets into liabilities." Scott C. Clelland, *Reciprocal Comp for Internet Traffic*, Legg Mason Precursor Research, June 24, 1998. Internet reciprocal compensation therefore pays carriers not to invest in their own competing facilities and not to provide their own competing service to residence or small business customers.

The reason is simple: If competing carriers sign up residential or other dial-up Internet users for their own local services, they can kiss the risk-free cash from reciprocal compensation on those lines goodbye. Plus, they then have to pay reciprocal compensation when they hand off calls to another carrier for delivery to an Internet service provider.

The lure of free cash also inspires conduct bordering on fraud. Because reciprocal compensation is available only for calls that begin and end in the same local calling area, some carriers have assigned multiple blocks of numbers to Internet service providers – each attributable to a different local calling area – in order to make calls to those providers from distant calling areas appear "local." In fact, one Internet service provider cum carrier has locked up well over 100 NXXs – representing over a million numbers – all without a single local telephone customer. These illicit activities only exacerbate the problem, deprive the originating carriers of toll revenues they are entitled to, and contribute to the rapid exhaustion of numbers to boot.

Moreover, an order by this Commission will not displace any authority that properly belongs to the states. The Commission need only confirm what it said in its own previous orders by once again declaring that Internet traffic is interstate and interexchange, and, therefore, is not subject to reciprocal compensation under the Act as the Commission previously interpreted it. Such a ruling is not a role assigned to the states by the 1996 Act, nor would it override arbitration results by re-interpreting individual contracts. In fact, many of the state orders said they were addressing the issue only because this Commission has not yet done so, and made it clear that their orders are subject to correction once this Commission does act. *See* Attachment A. And their orders themselves are based on a mistaken interpretation of this Commission's prior orders.

5. The Act's nondiscrimination standard prohibits only competitively significant differences. The competitive checklist in section 271 of the Act requires the Bell companies to provide "non-discriminatory access" to, among other things, network elements, databases and associated signalling. A number of the commenters here, appear to interpret this to impose a requirement of absolute equality. This is not the right standard.

As a practical matter, there necessarily will be some differences between the access a Bell company provides to other carriers and the access it provides to itself. To pick just one example, whenever a Bell company provides other carriers with a separate electronic gateway to obtain access to databases or support systems, there necessarily will be some difference between the way the Bell company interacts with those systems, and the way a competitor does.

The mere fact that there may be some technical differences in the way a competitor obtains access should not be the issue, however. Instead, the real question should be whether any differences that do exist are competitively significant.

This is the standard that Judge Greene applied under the AT&T consent decree. For example, Judge Greene held that access was "equal" when "overall quality in a particular area is equal within a reasonable range which is applicable to all carriers," and he declined to "insist on absolute technical equality" which would have meant identical values for loss, noise, probability of blocking, and the like. *United States v. Western Elec. Co.*, 569 F. Supp. 1057, 1063 (D.D.C. 1983). Unduly rigid demands for technical equality, he concluded, "would necessitate substantial dismantling and reconstruction of local telephone networks without any real benefits either to the consuming public or to AT&T's intercity competitors." *Id.* Access was equal if AT&T's competitors "would not be disadvantaged" competitively. *Id.* at 1064. The same reasoning applies here.

Indeed, the Department of Justice apparently agrees with this interpretation.[3] For example, the Department's evaluation of BellSouth's South Carolina application acknowledged that the access provided to operations support systems may not be "identical or precisely comparable to the functionality available for the applicant's own

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[3] Consequently, to the extent the Department recites here differences between BellSouth's performance for itself and BellSouth's performance for competing carriers, without any analysis of whether the differences are competitively significant based upon the specific facts of this case, it performs only part of the analysis. *See, e.g.,* DOJ Louisiana II Evaluation at 29 (Department states that CLECs "have experienced average response times nearly twice those experienced by BellSouth's own retail representatives" for obtaining customer service records without indicating what the response times were or the competitive significance of the difference).

use." DOJ S.C. Evaluation at 27-28. There, the Department argued that the Commission should not "require 'perfection' in OSS offerings as a condition of section 271 approval." *Id.* at 28. Instead, in those instances where differences do exist, the relevant inquiry is whether those differences will "materially impact competition." *Id.*[4] That remains the appropriate inquiry under the requirement to provide "nondiscriminatory access" and the Commission's standard that the access provided to OSS should allow competing carriers to perform the functions "in substantially the same time and manner" as the incumbent.[5]

6. The competitive checklist cannot be expanded to require fully automated access to operations support systems. Despite an express statutory prohibition against expanding the terms of the competitive checklist, 47 U.S.C. § 271(d)(4), some of the commenters here urge the Commission to reject BellSouth's application because, they claim, competing carriers' orders do not "flow through" to BellSouth's service order processor at the same rate as BellSouth's own orders do. In essence, these commenters would have the Commission add a new term to the checklist to require that the Bell companies provide, at least in some circumstances, fully automated access to their

[4] The Department made the same point in the Ameritech proceeding, where it identified a problem Ameritech was experiencing with trunk blocking. It did not conclude that any difference in the level of blocking was dispositive by itself, however. Instead, according to the Department, "the relevant question is whether the difference between the competitors' experience and Ameritech's own retail blocking is sufficiently significant as to deviate from section 251(c)(2)'s mandate that CLECs be afforded interconnection on 'nondiscriminatory' terms." DOJ Michigan Evaluation at 25-26 (emphasis added).

[5] *Local Competition Order* at 518.